

MEMORANDUM OF LAW

DATE: March 4, 1987

TO: John Lockwood, City Manager

FROM: City Attorney

SUBJECT: Conflict of Interest Questions Regarding
Commander K. N. Fortier

Arising from recent print media articles detailing three (3) property transactions involving Commander K. N. Fortier, you have requested our comprehensive review of the facts and analysis of any potential conflicts of interest. We have reviewed the pertinent facts and conclude that no conflict of interest laws were breached. Our analysis follows.

As early as August 10, 1983, the Public Services and Safety Committee authorized the "acceleration" of the Police Department's Administrative and Technical Center through building by a private developer with an option to purchase. City Manager's Report Nos. 83-337 and 83-520. After a review of six (6) separate financing proposals, the "Starkey Proposal" consisting of a seven-story, 160,000 square foot office building at "14th, 15th, Broadway and E Streets," emerged. City Manager's Report No. 83-520, page 3, dated December 8, 1983.

While competing sites were also considered, on April 11, 1984, the Public Services and Safety Committee approved preliminary financing, design and construction plans for the facility and this action was widely reported. San Diego Union and Tribune, April 12, 1984; Los Angeles Times, April 12, 1984; San Diego Daily Transcript, April 12, 1984. Finally, on May 7, 1984 Ordinance No. O-16199 was approved authorizing a lease and trust agreement to obtain and finance the facility with construction on the facility beginning on October 2, 1984.

Juxtaposed to this public activity is the private land acquisitions of Commander K. N. Fortier who acquired three (3) parcels of land near the Administrative and Technical Center. With his wife, Commander Fortier acquired undivided one-half interests in real property and improvements located at 1343-45

C Street, 1040 14th Street and 1028 14th Street. Of critical import is the fact that escrow on the first two (2) parcels opened on November 8, 1984 and closed January 9, 1985, while the later parcel opened escrow on March 4, 1985 and closed May 10, 1985.

As a public employee who is also a designated employee, the

Political Reform Act (California Government Code section 81000 et seq.) places a dual obligation on Commander Fortier. The first restriction is aimed at disqualification; the second is aimed at disclosure and avoidance.

California Government Code section 87100 prohibits a public official from making or participating in making a governmental decision in which he or she knows or has reason to believe he or she has a financial interest. A person has a financial interest within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on

....

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

California Government Code section 87103

In administering and construing the disqualification provisions, the Fair Political Practices Commission has formulated a four (4) part test:

Under the foregoing sections, several elements must be present before a public official is required to disqualify himself from participation in a governmental decision. First, it must be reasonably foreseeable that the governmental decision will have a financial effect. Second, the anticipated financial effect must be on a financial interest of the official, as defined in Sections 87103(a) through (d). Third, the anticipated financial effect must be material. And fourth, the governmental decision's anticipated financial effect on the official's financial interest must be distinguishable from its effect on the public generally.

In re Opinion requested by Tom Thorner, 1
FPPC Opinions 198, 202 (1975)

While Commander Fortier was unquestionably involved in the governmental decision to locate the Administrative and Technical Building at 14th and Broadway, and while this decision was roundly debated through 1983 and into 1984, the decision was concluded and confirmed in the Council's action of May 7, 1984 in enacting Ordinance No. O-16199.

Manifestly, then, all participation by Commander Fortier was concluded by May 7, 1984 and hence predates by a full six (6)

months the opening of escrow on 1343-45 C and 1040 14th Street. Having absolutely no legal interest in these properties during the debate over confirmation of the new location, there was absolutely no financial effect on or to Commander Fortier flowing from his participation in this governmental decision. Since the acquisition of the third parcel, 1028 14th Street, occurred over one (1) year after the May 7, 1984 decision, it likewise was not a financial interest which was impacted at the time of Commander Fortier's participation in the site selection process.

In addition to potential disqualification, the Political Reform Act mandates that each agency adopt a particularized Conflict of Interest Code aimed at disclosure.

. 87300. Agency; adoption and promulgation; effect of violation

Every agency shall adopt and promulgate a Conflict of Interest Code pursuant to the provisions of this article. A Conflict of Interest Code shall have the force of law and any violation of a Conflict of Interest Code by a designated employee shall be deemed a violation of this chapter.

The Police Department's Conflict of Interest Code was adopted on April 27, 1977 with its "Designated Positions, Duties, and Categories" revised on February 18, 1986. This code, providing for both rules of conduct and disclosure of interests, is designed to preserve the confidence of the citizenry that govern-mental decisions will be free of personal prejudice.

SECTION 100 PURPOSE AND SCOPE

A. The maintenance of the highest standards of honesty, integrity, impartiality and conduct by Police Department employees is essential to assure the proper performance of City business and maintenance of confidence by citizens in their government. The avoidance of conflicts of interest on the part of Police

Department employees through informed judgment is indispensable to the maintenance of these standards.

Division II of the Conflict of Interest Code sets out areas of proscribed conduct which include in relevant part:

SECTION 200 PROSCRIBED ACTIONS

A. An employee shall avoid any action, whether or not specifically prohibited by law,

which may tend to affect his or her job performance creating the appearance of:

1. Using public office for private gain.

. . . .

SECTION 203 FINANCIAL INTERESTS

An employee shall not:

A. Have a direct or indirect financial interest that conflicts or appears to conflict with his or her City duties and responsibilities; or

B. Engage in, directly or indirectly, a financial transaction as a result of or primarily relying on information obtained through his or her City employment.

Common to each prohibition, however, is the requirement that there be a necessary nexus between the public position and activity sought to be avoided. With acquisition of property by Commander Fortier occurring some six (6) months and one (1) year after a two-year long public debate over location of the police site, no argument can be made that either private information or public position had any bearing on these purchases.

In short, these purchases were made in the open market in open competition with all investors. To condemn such a functioning of the free market place is something that neither our Constitution nor any conflict of interest code could sanction.

We stated in Carmel (p.269) that "there must be a balancing of interests between the government's need to expose or minimize possible conflicts of interest on the one hand and the right to maintain privacy in one's personal financial affairs while seeking or holding public office on the other"

We concluded that " . . . no overriding necessity has been established which would justify sustaining a statute having the broad sweep of the one now before us, which, as stated, would intrude alike into the relevant and the irrelevant private financial affairs of the numerous public officials and employees covered by the statute and is not limited to only such holdings as might be affected by the duties or functions of a particular office."

(Id., p. 272.)

County of Nevada v. MacMillen,

11 Cal.3d 666, 671 (1974),
quoting City of Carmel-by-the-Sea
v. Young, 2 Cal.3d 259, 272 (1969)

¶Emphasis added.σ

We have additionally examined these transactions in the light of Council Policy 000-4 prohibiting the use of public office for private gain or conflicting responsibilities. Since the purchase of this property postdated the governmental decision as detailed above, there is no suggestion or evidence that these purchases were accomplished or assisted by Commander Fortier's position or posture.

In the course of this review, then, we have found nothing to suggest or sustain any conflict of interest on the part of Commander K. N. Fortier. Further, Commander Fortier has personally been more than cooperative in this office's desire for information and confirmation of events. We have, however, under separate memorandum, suggested the Police Department reevaluate the disclosure categories in Exhibit A of their Conflict of Interest Code.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:js:048.7.2(x043.2)

ML-87-20

cc W. B. Kolender,

Chief of Police

K. N. Fortier,

Commander, Police Dept.

John S. Einhorn, Esq.